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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No: 682

THE NORWICH PHARMACAL COMPANY,

Petitioner,

—against—

STERLING DRUG, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE NORWICH PHARMACAL COMPANY,

Petitioner,

—against—

STERLING DRUG, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, The Norwich Pharmacal Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on November 9, 1959.

Opinions Below

The opinion of the District Court for the Northern District of New York (R. 660-70), printed in the

Appendix hereto, *infra*, pp. App. 4-15, is reported at 167 F. Supp. 427.

The opinion of the Court of Appeals for the Second Circuit (R. 676-83), printed in the Appendix hereto, *infra*, pp. App. 16-24, is reported at 271 F. 2d 569.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit here sought to be reviewed was made and entered on November 9, 1959 (R. 684-85). A copy is appended hereto, printed in the Appendix, *infra*, pp. App. 25-27.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

Questions Presented

The action is an unfair competition action for an injunction. It is based upon respondent's deliberate and complete product copying of petitioner's liquid pharmaceutical preparation, Pepto-Bismol, in respondent's competitive product, Pepsamar—copying not only of the essential product itself, but also of all of its non-functional features and characteristics by which, through petitioner's long and extensive advertising and sales, the public has come to identify and know petitioner's product.

The action was removed by respondent from the Supreme Court of the State of New York in and for Chenango County to the United States District Court for the Northern District of New York (28 U. S. C., § 1441 (a)). Jurisdiction of the federal

courts is based solely upon diversity of citizenship of the parties (28 U. S. C., § 1332 (a) (1)).

The District Court granted an injunction (R. 660-70 and 673-75). The Court of Appeals for the Second Circuit reversed (R. 676-85).

The questions presented are these:

(1) Whether—in limiting enjoinable unfair competition only to (a) cases of secondary meaning plus likelihood of confusion, or (b) cases of palming off, actual deception, or interference with confidential or contractual relations—the Court of Appeals has not decided important questions of the unfair competition law of New York in conflict with applicable New York law measuring unfair competition by equitable fairness or unfairness and incorporating the cognate doctrine against misappropriation for commercial advantage of some benefit or "property right" equitably belonging to another?

(2) Whether—in deciding this case upon its own precedents and those of other federal courts—and in ignoring the unfair competition law of New York as declared by the New York courts, except to attempt to rationalize it to the federal decisions by contextually-unmeaningful analogies—the Court of Appeals has not ignored or misapplied the principle of substantial uniformity of result within a state that is commanded in diversity-of-citizenship cases by the Rules of Decision Act (28 U. S. C., § 1652) as interpreted by this Court in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and subsequent cases?

(3) Whether—in setting aside the District Court's finding of fact that the opaque pink color of peti-